

FILED

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(Baltimore Division)

FEB 19 2001

CLERK'S OFFICE
U. S. BANKRUPTCY COURT
DISTRICT OF MARYLAND
BALTIMORE

In re:

FRANK'S NURSERY & CRAFTS, INC., et
al.,

Debtors.

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Case Nos. 01-52415-JS TH 2016/11 01-52416-JS
(Chapter 11)
(Jointly Administered)

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**DEBTORS' MOTION FOR ORDER AUTHORIZING DEBTORS TO
EMPLOY AND COMPENSATE PROFESSIONALS FOR
SPECIFIC SERVICES RENDERED IN THE ORDINARY
COURSE OF BUSINESS, NUNC PRO TUNC, TO PETITION DATE**

Frank's Nursery & Crafts, Inc. ("Frank's") and FNC Holdings, Inc. ("FNC"), the above-captioned debtors and debtors in possession herein (collectively, the "Debtors"), by counsel, file this Motion For Order Authorizing Debtors To Employ And Compensate Professionals For Specific Services Rendered In The Ordinary Course Of Business, Nunc Pro Tunc, To Petition Date (the "Motion"), and in support thereof state:

Jurisdiction

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue lies properly in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding pursuant to 28 U.S.C. § 157.

2. The relief sought with this Motion is based upon section 327 of Title 11 of the United States Code, 11 U.S.C. §§ 101 et. seq. (the "Bankruptcy Code") and Rules 2014 and 2016 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

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The Chapter 11 Cases

3. On the date hereof (the "Petition Date"), each of the Debtors filed with this Court a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors continue in possession of their respective properties and the management of their respective businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

4. By motion concurrently herewith, the Debtors seek entry of an order of this Court authorizing the procedural consolidation and joint administration of these cases.

The Debtors and Their Business Operations

5. Frank's, founded in 1949, operates the largest United States chain (as measured by sales) of specialty retail stores devoted to the sales of lawn and garden products. Lawn and garden products include green and flowering plants for outdoor and indoor usage, live landscape products such as trees and shrubs, fertilizers, seeds, bulbs, gardening tools and accessories, planters, watering equipment, garden statuary and furniture, wild bird food and feeders, mulches and specialty soils. Frank's also is a leading retailer of Christmas Trim-A-Tree merchandise, artificial flowers and arrangements, garden and floral crafts, and home decorative products. FNC (formerly known as General Host Corporation) is the sole shareholder of Frank's.

6. As of February 9, 2001, Frank's operated 217 retail stores in 15 states, primarily in the Mid-Atlantic, Midwest and Northeast. At that time, an additional 44 stores were being closed as part of a previously announced plan to sell under-performing store locations. In its fiscal year ending January 28, 2001, Frank's had sales of approximately \$435 million. Currently, the Debtors employ approximately 1,900 full-time and 5,000 part-time employees. As of November 5, 2000, the Debtors had total assets of approximately \$471.9 million and total debt of approximately \$338 million.

7. The Debtors' sales are seasonal. The lawn and garden revenues are concentrated principally in the Spring and, to a lesser extent, in the Fall. The Trim-A-Tree sales occur between Thanksgiving and Christmas.

8. During most of the first half of 2000, weather patterns negatively impacted lawn and garden product sales across the Debtors' principal markets. During the third quarter of 2000, the Debtors decided to close 44 under-performing stores, liquidate their inventories, and sell the closed stores owned by the Debtors. Later in 2000 it became apparent that the Debtors' Trim-A-Tree holiday season sales were below expectations, which was consistent with the general softness in sales at retailers during this period.

9. In 2001, notwithstanding excess borrowing availability under their existing bank credit facilities, the Debtors were unable to draw down sufficient funding to meet the Debtors' working capital needs because the Prepetition Lenders asserted that various conditions to borrowing had not been met. (The Prepetition Lenders, however, did provide limited funding subject to various conditions.) Also, in the relatively short period since access to their credit facilities had been curtailed, the Debtors were unable to secure additional funding to meet those working capital needs. Ultimately, the Debtors determined the most appropriate method to obtain such financing and achieve their restructuring objectives was through chapter 11 filings.

Need for Ordinary Course Professionals

10. The Debtors own and operate garden and craft stores in fifteen (15) states. From time to time in the ordinary course of business, the Debtors require specialized or local professional assistance in connection with the operation of their businesses including tax, real estate, employee or regulatory issues, and other matters. To address these matters, the Debtors need to retain attorneys and other professionals on an "as needed" basis so the Debtors may act

in an efficient and timely manner. Often, the Debtors utilize particular professionals in specific locations on a regular basis who are familiar with the legal and other issues that arise. Most of these professionals are consulted on an infrequent or semi-regular basis. All such professionals are hereinafter referred to as “Ordinary Course Professionals”.

11. Due to the limited nature of the work to be performed by the Ordinary Course Professionals and the costs associated with the preparation of retention and fee applications for such professionals, it would be impractical and burdensome for the Debtors to submit individual applications for each such Ordinary Course Professional and for such Ordinary Course Professional to apply to this Court for approval of its compensation.

12. To determine whether an entity to be employed in a bankruptcy case is a “professional” within the meaning of § 327 of the Bankruptcy Code, courts typically apply either a qualitative or a quantitative test. *See In re First Merchants Acceptance Corp.*, 1997 WL 873551 at 2 (D. Del. 1997); *In re Seiling Associates Limited Partnership*, 128 B.R. 721, 722 (Bankr. E.D. Va. 1991). Under the quantitative test, courts have required that an entity providing professional services play a “central role” in estate administration before it is considered a professional under § 327. *See, e.g., In re That’s Entertainment Mktg. Group, Inc.*, 168 B.R. 226, 230 (N.D. Cal. 1994) (only retention of professionals whose duties are central to the administration of the estate require prior approval under § 327); *In re Madison Management Group, Inc.*, 137 B.R. 275, 283 (Bankr. N.D. Ill. 1992) (same); *Seiling Associates*, (same); *In re D’Lites of Am., Inc.*, 108 B.R. 352, 355 (Bankr. N.D. Ga. 1989) (§ 327 approval is not necessary for “one who provides services to the debtor that are necessary whether the petition was filed or not”); *In re John-Manville Corp.*, 60 B.R. 612, 620 (Bankr. S.D.N.Y. 1989) (same). By contrast, under the qualitative test, an entity is considered a professional if it is permitted to exercise

discretion and autonomy in addressing the administration of the estate. *See, e.g., In re Fretheim*, 102 B.R. 298, 299 (Bankr. D. Conn. 1989).

13. Recognizing the two tests are similar, the First Merchants Court harmonized the two standards and developed a non-exhaustive list of factors for determining whether a debtor's professional is subject to § 327. These factors include:

(a) Whether the entity controls, manages, administers, invests, purchases or sells assets that are significant to the debtor's reorganization;

(b) Whether the entity is involved in negotiating terms of a plan of reorganization;

(c) Whether the employment is directly related to the type of work carried out by the debtor or the routine maintenance of the debtor's business operations;

(d) Whether the entity is given discretion to exercise his or her own professional judgment in some part of the administration of the debtor's estate;

(e) The extent of the entity's involvement in the administration of the debtor's estate; and

(f) Whether the entity's services involve some degree of special knowledge or skill, such that the entity can be considered a professional within the ordinary meaning of the term.

First Merchants, 1999 WL 873551 at 3. The factors are to be considered in their totality, with no single factor being dispositive. *Id.*

14. In light of the factors, professionals assisting the day-to-day operation of the debtor's business, rather than the administration of the bankruptcy estate, are not professionals that must be retained under § 327. Thus, the Ordinary Course Professionals identified in this Motion are not subject to retention under § 327.

The Procedure for Employment of Ordinary Course Professionals

15. Accordingly, with respect to Ordinary Course Professionals already rendering services to the Debtors prior to the Petition Date, the Debtors request authority to employ them

(if needed), on the same terms as those in effect prior to the Petition Date, without the need to file individual retention applications. Attached hereto as **Exhibit A**, is a list of the Ordinary Course Professionals currently employed by the Debtors. To the extent the Debtors hire additional Ordinary Course Professionals, notice of such additions will be filed with the Court and served on the Office of the United States Trustee and counsel to any official committee(s) appointed in these cases pursuant to 11 U.S.C. § 1102 (the “Committees”).

16. The Debtors propose to pay the Ordinary Course Professionals, on a monthly basis, without formal application to the Court, 100% of the interim post petition fees and disbursements included in an appropriate invoice that sets forth in reasonable detail the nature of the services rendered. The Debtors propose to utilize this procedure provided the fees and disbursements to be paid to any such Ordinary Course Professional do not exceed \$20,000 in any calendar month.

17. The Debtors will provide the Office of the United States Trustee and the Committees a quarterly report setting forth:

- (a) All Ordinary Course Professionals who received payments during each month in that quarter;
- (b) The aggregate amount of payments to each Ordinary Course Professional to date; and
- (c) The substance of the work performed by each Ordinary Course Professional during the quarter.

18. The Debtors and each Ordinary Course Professional shall, upon request of the Office of the United States Trustee, provide the Trustee with further detail regarding the work performed by the respective Ordinary Course Professional to the Office of the United States Trustee.

19. At any point, the Office of the United States Trustee may notify the Debtors in writing that the Trustee does not believe a particular Ordinary Course Professional should remain eligible to be treated as an Ordinary Course Professional (such an individual shall hereinafter be referred to as a “Former Ordinary Course Professional”). Such notice shall trigger a requirement that the Former Ordinary Course Professional file an application to be employed pursuant to § 327. Any such application filed by a Former Ordinary Course Professional shall, for all purposes, be nunc pro tunc to the Petition Date or the date the Former Ordinary Course Professional was first employed by the Debtors, whichever is later.

20. Any Committee may file a motion seeking the Court’s determination that a particular Ordinary Course Professional should be required to file an application to be employed pursuant to § 327 and be considered a Former Ordinary Course Professional.

21. Due to the limited nature of the matters for which the Ordinary Course Professionals are to be employed, the Debtors submit that no creditor or party-in-interest would be prejudiced by entry of an order authorizing the Debtors to employ and compensate their Ordinary Course Professionals as specified in the attached proposed Order.

22. Upon information and belief, none of the current Ordinary Course Professionals holds or represents any interest adverse to either the Debtors or their estates (the “Estates”) with respect to the matters upon which each such Ordinary Course Professional is to be employed, except that certain of such Professionals may be owed fees and expenses from the pre-petition period that are believed to be *de minimis* in amount.

23. The foregoing proposed procedures for retention and payment will not apply to those attorneys and professionals retained or to be retained by the Debtors pursuant to separate orders of this Court.

24. The Debtors also request that any retention pursuant to this Motion be granted on a nunc pro tunc basis to the Petition Date, in order to allow the Ordinary Course Professionals to be compensated for work they have performed for the Debtors since the Petition Date.

25. The Debtors submit their ability to employ and compensate the Ordinary Course Professionals in the manner proposed herein is in the best interests of their estates, creditors and other parties-in-interest. The procedures would be cost-efficient, allow the Debtors to utilize the expertise and background knowledge of certain of these Ordinary Course Professionals, and help the Debtors avoid any disruption in the professional services they require in the day to day operation of their business.

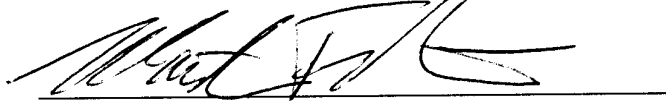
Conclusion

WHEREFORE, the Debtors respectfully request entry of an Order authorizing the Debtors to employ and compensate professionals nunc pro tunc to the Petition Date for services rendered in the ordinary course of business in the manner proposed herein; and granting such other and further relief as is just and proper.

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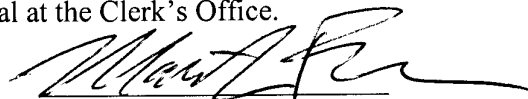


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CERTIFICATE OF SERVICE

I certify that on this 19th day of February, 2001, a copy of the foregoing pleading was sent by the means indicated and to the parties identified on the Omnibus Certificate of Service filed concurrently with this pleading. In order to expedite the copying and transmittal of pleadings to parties in interest, a copy of the Omnibus Certificate of Service was not transmitted with the pleading. Any party desiring a copy of the Omnibus Certificate of Service may contact the undersigned or may review the original at the Clerk's Office.



Martin T. Fletcher

Exhibit A

Exhibit A
Ordinary Course Professionals

Attorney	Practice Area
W.A. Steiner, Jr. Chris Olsen Adam Fishkind Dykema Gossett, PLLC 400 Renaissance Center Detroit, MI 48243-1668	Real Estate
Diana Prevete Gary Steinburg Albanese, Albanese & Fiore 1050 Franklin Avenue Garden City, NY 11530	Real Estate
Jack Nilon Michel Osterlich Kassab, Archibald, Etal 214 N. Jackson Street Media, PA 19063	Real Estate
James E. Stahl Rosalind Westlake Borrus, Goldin, Foley, Vignuolo, Hyman, Stahl & Clarkin 2875 US Highway 1 North Brunswick, NJ 08902	Real Estate
Joseph M. Scimia Baker & Daniels 300 N. Meridian Street, Suite 2700 Indianapolis, IN 46204-1782	Real Estate
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Price M. Shapiro VanDeventer Black, LLP 500 world Trade Center Norfolk, VA 23510-1699	Real Estate
Tom King Kreis, Enderle, Callander & Hudgins One Mooresbridge, PO Box 4010 Kalamzoo, MI 49003	Real Estate
Gary Cooper Cooper & McCann Tarrytown-ECC Three W. Main Street Elmsford, NY 10523	General Liability Employment

Jodi Corrigan Annis, Mitchell et al Suite 2200 One Tampa City Center Building Tampa, FL 33601	Circle K Environ. Matters Only
Kevin Duckworth Hinshaw & Culberston 222 n. LaSalle Street, Suite 300 Chicago, Illinois 60601	Full Services: Employment Law General Liability Real Estate Tax
Kelly Keys Gonzalez, Saggio et al 225 E. Michigan, Suite 408 Milwaukee, WI 53202	General Liability Employment Law
Bill Hayes Shook, Hardy & Bacon L.L.P. 84 Corporate Woods, Suite 1000 10801 Mastin Overland Park, Kansas 66210	GH-Environment Groundwater Clean Up
John DeMaria DeMaria & Associates 6 Beacon Street 10 th Floor, Suite 1000 Boston, MA 02108	Landfill Matters Only
Michael Fitzhugh Fitzhugh & Associates 155 Federal Street, 1700 Boston, MA 02110-1727	General Liability
Michael Brown Brown, Diffenderffer et al Tidepoint, The Tide Building Suite 300, 1010 Hall Street Baltimore, Maryland 21230	General Liability
Andy Basile Young & Basile 3001 Big Beaver Troy, Michigan 48084-3109	Trademark
Terence Page Michael Clawson Hardy, Lewis & Page 401 Old S. Woodward Birmingham, MI 48009	Employment Law Real Estate
Jeffrey Sherbow Sherbow & Mitchell 3001 Big Beaver Road, Suite 600	General Liability Worker's Compensation

Troy, Michigan 48084	
Jerry Blackwell Blackwell, Lgbanugo 3601 W. 76 th Street, Suite 250 Minneapolis, MN 55435	General Liability
William Banton Marshall, Dennebey et al. 1845 Walnut Street Philadelphia, PA 19107	Full Service: General Liability Worker's Compensation
Otto Beatty Baker & Holstetler 65 East State Street Suite 2100 Columbus, Ohio 43215	Full Service: Worker's Compensation